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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 516.

HOWARD C. CHAPIN, PLAINTIFF IN ERROR,

vs.

JAMES STREETER, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

WHIPPLE & PIERSON, PRINTERS, DENVER

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STATEMENT OF FACTS.

This was an action for rent brought by Streeter against Chapin upon a lease dated the 31st day of October, 1881, on which day Streeter and Chapin were the joint owners of the Clarendon hotel at Leadville, and the furniture and fixtures and all the appurtenances relating thereto, and were running the same as a hotel, as tenants in common. The complaint was filed on the 24th day of July, 1883. It alleged the citizenship of Streeter in the State of Kansas, and that of Chapin in the State of Colorado. That upon the 31st day of October, 1881, Streeter leased and demised to Chapin, by an instrument in writing, the undivided half of lots 10, 11 and 12, in block 1, in Leadville, Colorado, and the buildings thereon situate, including the Clarendon hotel and all the hotel furniture

therein, for the term of two years next ensuing the first day of November, 1881 (folio 3), for the sum of $18,000, payable in installments; $833 1-3 to be paid in advance on the first day of each month during the first year, and $666 2-3 on the first day of each month during the second year; payments to commence on the first day of November, 1881 (folio 4). That at the expiration of the lease, Chapin was to yield and deliver up the undivided half of the property so leased in as good order and condition as when received, loss by fire and unavoidable accident and ordinary wear excepted; that the lease also contained covenants to keep the premises in repair, and not to underlet the same nor the furniture therein or to assign the lease or any interest therein, without the written consent of Streeter first had and obtained. It was further covenanted in the lease that if the rent was not paid at the times specified (folio 5), or allowed to remain overdue, or if default should be made in any of the covenants, terms or agreements by said Chapin, it should be lawful for Streeter, his heirs, agents, attorneys or assigns, at either his or their election, to end said term and enter said premises or any part thereof, with or without process of law, and to use such force as was necessary to obtain possession of the undivided half of said premises and furniture. It was then provided that said Chapin should, at the expiration of said term, replace the furniture, including all linen, beds, bedding and the like, in as good condition as when received by him, save the natural wear thereof; and it was provided that said Chapin should not, during said term, remove or take out of said hotel any furniture, carpets, linen, beds or bedding or other furniture, without the written consent of said Streeter, unless the same shall have become destroyed or worn out. It was further provided that in consideration of the premises said Streeter agreed that he would sell

and convey unto Chapin all of his right, title and interest in and to said property so leased and demised, provided he would, within twelve months following the first day of November, 1881, pay therefor the sum of $23,000 in cash. If such election is made before the first day of January, 1882, then the further sum of $1,666 2-3, less any sum theretofore paid for rent before the making of such election, which could only be evidenced by the payment of the $23,000.

The declaration then averred that default was made in the payment of the rent due on the first of December, 1882, and that default was made in the payment of rent in each and every month following the first day of December, 1882, and including the first day of July, 1883, and judgment was prayed for each of these respective sums of money with interest thereon from the date they were due until the day of the rendition of judgment in the cause, together with costs of suit. (Folio 11.)

On the tenth day of September, 1883, defendant Chapin filed his answer, which answer, on motion of plaintiff, was stricken from the files and a second answer was interposed (folio 28) which admitted the making of the lease set up in the complaint, and the peaceful enjoyment by Chapin of the premises until the tenth of May, 1882 (folio 29). That upon the first of January, 1882, the plaintiff Streeter was indebted to the County of Lake, in the State of Colorado, in the sum of $4,002.50 for taxes assessed upon the property owned by said plaintiff for the years 1880 and 1881, which taxes, on the tenth day of May, 1882, were due and unpaid, and on said last named date one John Hays, the Treasurer of Lake County, distrained and levied upon the undivided half of all the furniture and fixtures in said Clarendon hotel for the purpose of collecting the delinquent taxes due from said Streeter for the years 1880 and 1881, and interest thereon

and the necessary costs of sale; that said Hays, as Treasurer, distrained and seized the undivided half of said property, excepting the real estate there mentioned, and proceeded to advertise the same for sale. (Here follows an averment as to the manner of advertising, on which no point is made.) That said Hays, Treasurer of said Lake County, on the sixteenth day of May, 1882, proceeded to sell said property to the highest and best bidder for cash, and the same was sold to one John W. Jacque, he being the highest and best bidder for the same, and the possession of said undivided one-half of said property was then, by said Hays, Treasurer as aforesaid, delivered to said Jacque, by reason whereof defendant was deprived of the use and enjoyment of said property, furniture and fixtures, to which he was entitled under and by virtue of said lease (folio 31), and that defendant Chapin had been damaged by the sale of said undivided halt of said furniture and chattels, so leased, in the sum of $5,000, and in the further sum of $500, money by him laid out and expended for the purpose of retaining and using said furniture during the term for which the same was leased.

And, for a third and further defense, defendant pleaded (folio 32) that there was assessed upon the whole of said furuiture and property mentioned in said lease, taxes for the years 1880 and 1881, the sum of $631.80, which property was, at that time, owned jointly by plaintiff and defendant, each owning the undivided half thereof, and the same was assessed to them under the name of Streeter & Chapin, and that Chapin paid to the Treasurer of Lake County one-half of the taxes so assessed against said property, and was, by said Treasurer, fully discharged from all claims for taxes on said property for said years, 1880 and 1881, and defendant avers that he requested plaintiff to pay his half of said taxes, but that Streeter

refused so to do, and repeatedly declared that he never would in any manner pay the half of said taxes and notified defendant that he never would allow or repay to him any part of said taxes, if said defendant paid them; that such declarations were made by plaintiff to defendant prior to the execution of said lease and while they were in partnership, keeping said hotel, and also after the dissolution of said partnership and after the execution of said lease by said plaintiff (folio 33).

Here follows an allegation as to the seizure of said personal property by said Hays to pay said taxes so due by said plaintiff to said Lake County, and the advertisement and sale of the same to pay said taxes, and that the same was bid off by one John W. Jacque for the sum of $106. (Folio 34.)

Then follows an allegation that defendant was damaged in the sum of $5,500 as money by him paid out and expended for the purpose of retaining and using said furniture during the term for which the same was leased.

To this answer, upon the 3d of December, 1883, plaintiff filed a replication (folio 37) in which he denied all the material allegations therein. And further replying, alleged that before the making of said lease plaintiff and defendant were in partnership, owning and running said hotel as partners, which partnership was, upon the 31st day of October, 1881, the day the lease was executed, dissolved (folio 45), and that whatever taxes were assessed against said property, as alleged in said answer, were assessed and levied against the joint property of plaintiff and defendant, of which defendant was in possession as plaintiff's partner; denies that defendant on the 18th day of May, 1882, or at any other time, paid his half of said taxes to the Treasurer of Lake County. Plaintiff then alleges that defendant fraudulently induced said Hays to pretend to seize said property (folio 46) without

any real distraint, and to sell the undivided half of the same, and that defendant fraudulently colluded with said Jacque to prevent other persons from bidding at said tax sale, and induced the said Jacque to bid the same off without his paying anything therefor; that he was bidding for the same as defendant's trustee and agent. Plaintiff then denies any taxes being due upon the 17th day of May, 1882, from plaintiff and defendant to said Lake County. And as a further defense and replication plaintiff alleged that no sale of said property ever took place, and denies there was any taxes due from himself to said Lake County.

And for a sixth and further replication to the answer plaintiff alleges that the agreement last mentioned in the complaint is the same and identical agreement sued on in the case of James Streeter against Howard C. Chapin, being case No. 1049 on the docket of this Court, and tried and adjudicated at the May term, 1883, of this Court; that said James Streeter, plaintiff herein, was plaintiff, and said Howard C. Chapin, defendant herein, was defendant in the last mentioned action (folio 48). That this action is brought to recover installments of rent which accrued under the provisions of said lease since the commencement of said former action thereon; avers the Clarendon hotel mentioned is the same property, and that the furniture therein was the same property as was described in case No. 1049, and that the levy, distraint, assessment and sale of said interest in said furniture and fixtures for taxes for the years 1880 and 1881 by said John Hays, Treasurer of said Lake County, to said John W. Jacque is the same pretended assessment, levy, distraint and sale, and the same pretended notice of taxes alleged and attempted to be proved by defendant as a defense to said former action upon said contract of lease in this Court hereinbefore referred to (folio 49).

Upon the 8th of December, 1883, the Court made an order consolidating with the case just referred to, case No. 1328, between the same parties upon the same lease, because they were of a like nature and related to the same question, and the two cases were tried as one. The issues in the second case were the same as the one just referred to. The answer to the last case brought having been lost, a copy of said answer was substituted and is found on page 40 of the record.

Upon the 8th of December, 1883 (folio 67), the Court ordered the replication to the first answer, being No. 1278, to stand as a replication to the second, No. 1328, then consolidated with the first named case (folio 68). Whereupon, the causes so consolidated were tried before the Court and a jury, and plaintiff's damages assessed at $7,113.40, and judgment was rendered on the verdict for that amount in favor of plaintiff and against defendant Chapin (folio 69). That judgment is here for review.

Upon the trial plaintiff introduced testimony showing that plaintiff and defendant were keeping the Clarendon hotel (folio 79) in Leadville, as partners, in the years 1880 and 1881, each owning half of the real estate, as well as a like interest in the personal property, which partnership existed until the 31st day of October, 1881, when it was dissolved, and also showed the sum of $7,113.40, due as rent under said lease, and rested.

Whereupon, defendant introduced evidence showing that plaintiff and defendant, on the first day of May, 1882, were indebted to the County of Lake, for taxes assessed against them on their joint property, for the years 1880 and 1881, in the sum of $630 (folio 80). That to satisfy the sum of $315 of said taxes and the costs of sale, the Treasurer of said Lake County distrained, advertised and sold the undivided half of the furniture and other personal property in and about said hotel, owned by said

Streeter and Chapin jointly. The evidence also showed that Streeter was at the time of such distraint and sale, indebted to said Lake County in the sum of $452.31, for taxes assessed for the years 1880 and 1881, but the Court held that such fact would not avail defendant as a defense, for the reason that the levy and sale was not made on account of that tax.

It also appeared in evidence that John W. Jacque purchased the undivided half of said furniture and of all the personal property in and about said hotel, owned by said Streeter and Chapin jointly, for the sum of $106, which was paid by said Jacque to said Treasurer. It likewise appeared from the evidence that previous to such distraint and sale, Chapin paid to the treasurer the half of said $630, taxes assessed against such joint property. Defendant also introduced in evidence the assessment roll, tax list and the warrant attached thereto directing the Treasurer of Lake County to collect said taxes by a sale of the property of the persons against whom said taxes were assessed, which tax list and warrant were in due form, and authorized said Treasurer to collect by distraint and sale the taxes therein assessed. (Folio 81).

Defendant also introduced evidence to prove that the Treasurer of Lake County, on the 10th day of May, 1882, posted in five public places in the City of Leadville, in said County, to wit: one at the Merchants & Mechanics Bank, one on the front door of the Clarendon hotel, one on the front door of Charles Boetcher's store, one at the Court House and one at the corner of Harrison avenue and Sixth street, notices of said sale, which said several notices remained and continued so posted until and during the 16th day of May, 1882, and were in words and figures following, to wit:

"STATE OF COLORADO, } ss.
County of Lake. }

"Notice is hereby given that I, John Hays, Treasurer of Lake County, Colorado, by the power and authority in me vested, and in accordance with the laws made and provided for the collection of delinquent personal taxes, do hereby give notice that I have distrained the personal property of James Streeter, and will sell the same on the 16th day of May, A. D. 1882, at 10 o'clock a. m., of said day, at the Clarendon hotel, Harrison avenue, in the City of Leadville, County of Lake and State of Colorado, to the highest and best bidder for cash, the following described personal property, or so much thereof as will be necessary to satisfy the sum of three hundred and fifteen and 90-100 dollars, delinquent taxes for the years A.D. 1880 and 1881, and interest to the amount of sixty-six and 24-100 dollars, and the necessary costs of this sale, an individual half interest in the following described property to wit: The furniture of 65 bedrooms in Clarendon hotel, consisting of beds and bedding, chairs, washstands, bureaus and carpets in each room; also the furniture of 32 bedrooms in Tabor Opera House building, on upper floor, of same description as above; three billiard tables and fixtures, bar and bar fixtures, one safe, one office stove, office chairs, one showcase; carpets on all the rooms and halls; a lot of glassware, crockeryware, silverware and table cutlery; kitchen range and kitchen furniture; laundry range and fixtures; a lot of lamps and chandeliers, and all the other personal property of said James Streeter in Clarendon hotel and Tabor Opera House; all the above described property being situate in the County of Lake and State of Colorado.

"Dated at Leadville, this tenth day of May, A. D. 1882.

JOHN HAYES, *Treasurer.*

By P. J. QUIGLEY, *Dep. Treas.*"

Upon which no point was made at the trial (folio 83).

Defendant further introduced evidence showing that the rental value of the undivided half of the personal property so sold was $300 per month; that said defendant rented the undivided half of said personal property from said Jacque at the rate of $275 per month; that from the time of such sale until the rent accrued on which suit was brought, the total value of the rent of the undivided half of said personal property amounted to the sum of $5,775.

Defendant, to further maintain his defense, went upon the witness stand and was asked the following question: "State whether Mr. Streeter ever gave you any instructions or directions not to pay, as a member of the firm or as a joint owner of this property, any portion of the taxes or his half of the taxes upon his one-half of the goods?"

To the asking of which question the plaintiff, by his counsel, objected; which objection was by the Court sustained; to the sustaining of which objection, the defendant, by his counsel, then and there excepted. (Folio 83).

Thereupon, counsel for defendant made the following offer of proof: "The defendant here offers to prove by the witness on the stand that Mr. Streeter, the plaintiff, had frequently, prior to the sale of this property for taxes, notified Mr. Chapin, the defendant, not to pay any taxes on his part of the property owned by them in common, either real or personal, and had declared that if he did pay such taxes on his half of the property he would not allow it to him in their transactions as partners, nor would he pay it to him."

But the Court refused to allow the defendant to prove said facts; to which ruling of the Court, said defendant, by his counsel, then and there excepted.

And defendant further offered in evidence to maintain his defense, the partnership agreement between the said

plaintiff and defendant, entered into prior to the assessment and levy of the said taxes, and under which agreement the said plaintiff and defendant had carried on business up to the time of the dissolution aforesaid. The said agreement was offered for the purpose of getting in evidence the following stipulation therein contained:

"It is understood that no improvement shall be made on said hotel without the concurrence of both parties; and the expenses of all improvements so made, and all other necessary expenses in regard to the property used by said firm under this agreement or within the scope of said partnership, shall be borne equally by each party."

Which clause in the partnership agreement was admitted in evidence. Whereupon the Court charged the jury as follows:

"*Gentlemen:* We exclude the defense here on the ground that the sale was irregular, not made as required by law. There is no dispute as to the amount due upon the lease. The defendant was seeking to show that this property was sold, and bought by Mr. Jacque, to whom he became liable for half the rent that would be due for the use of the property, but as the sale was held to be irregular and void, that defense fails and the question recurs upon the amount due upon the lease. The defendant is going to contest the defense interposed by him in the Supreme Court, so it became necessary that you should hear this evidence, although they had the question up in another case. The amount claimed by the plaintiff is seven thousand one hundred and thirteen dollars and forty cents; we will enter your verdict for that amount."

To the giving of so much of said charge of the Court as excludes the defense of the defendant and declares the sale for taxes irregular and void, and directs a verdict

for the plaintiff, the defendant, by his counsel, then and there excepted. (Folio 86).

ARGUMENT.

The Court erred in excluding the proffered testimony of Chapin, defendant, that Streeter, the plaintiff, gave him instructions not to pay as a member of the firm of Chapin & Streeter, or as joint owner of the property, any portion of the taxes, or Streeter's half of the taxes upon his half of the goods. (Folio 83.)

This question should have been allowed. The answer set up, as a defense, that Streeter had told Chapin if he paid any of his taxes on this joint property it would not be credited to him in their settlement. There was no alternative left Chapin but to allow the property to be sold and he could have become the purchaser himself, and, as against Streeter, obtained a good title.

It is said in Sec. 158, Freeman on Co-tenancy and Partition: "Where the purchasing co-tenant has paid his "taxes, and is therefore free from fault, and there is noth- "ing in the relation between the parties imposing any "obligation on either to pay the charge upon the moiety "of the other, then it is difficult to assign any reason for "restraining the tenant, not in default, from bidding for "his own use at the tax sale. A payment by any of the "tenants relieves him from liability to loss through any "subsequent sale."

This record discloses the fact that Chapin, previous to the distraint and sale, had paid to the Treasurer of Lake County his half of the taxes due on the property (folio 81). To the asking of this question plaintiff objected generally. Which objection was sustained.

The second error assigned involves the same principle as the first, that is:

The Court below erred in refusing to admit the following testimony: (folio 84). Defendant offers to prove by the witness Chapin, then on the stand, that Streeter. the plaintiff, had frequently, prior to the sale of this property for taxes, notified Chapin, defendant, not to pay any taxes on his part of the property owned by them in common, either real or personal, and had declared that if he did pay such taxes on his half of the property he would not allow it to him in their transactions as partners, nor would he pay it to him. The rejection of this proof was duly excepted to. It should have been received upon the most obvious principles. What was Chapin's remedy, after receiving this notice from Streeter? If Chapin had paid the money and sought reimbursement Streeter could have defeated him by proving this notice forbidding the payment of this money for his use. Chapin, therefore, did the only thing left for him to do, viz: to allow the officers to seize and sell the property.

In Paige vs. Webster, 8 Mich., 263, at page 265, the Court declares the rule that one tenant in common may pay his own aliquot part, and then if the property is sold he may buy his co-tenant's interest. All that need be shown in this case is that the sale was lawful as between Streeter and Chapin. To the same point is Burler vs. Butler, 13 Mich., 292, at page 300.

Braker vs. Devereaux *et al.*, 8 Paige, 519.

This Court in Renkendorff vs. Taylor's lessee, 4 Peters, 361, at page 362, announces the same doctrine, where a lot is owned by two tenants in common and one pays his taxes, the interest of the other may be sold for the balance.

The Court below also erred in instructing the jury that the defense was excluded on the ground that the sale was irregular, not made as required by law, and was void (folio 86). It is a little difficult to understand what the

Court means by this language. Every illegal sale may well be claimed to be irregular, but every irregular sale is not by any means illegal. The assessment roll, tax list and warrant attached directing the Treasurer to collect the taxes (folio 81) were in due form and authorized said Treasurer to collect by distraint and sale.

Sec. 2888 of the General Statutes of the State of Colorado, provides: "When the Treasurer distrains goods he "may keep them at the expense of the owner, and shall "give notice of the time of their sale within five days "after the day of the taking, in the manner Constables "are required to give notice of the sale of personal prop- "erty on execution; and the time of the sale shall not be "more than ten days from the day of the taking; but he "may adjourn the sale from time to time for a period not "exceeding ten days, and shall adjourn when there are "no bidders; and in case of an adjournment he shall put "up a notice thereof at the place of sale. Any surplus re- "maining above the taxes, charges for keeping and fees "for sale, shall be returned to the owner; and the "Treasurer shall, on demand, render an account in writ- "ing of the sale and charges."

Section 1970, of the General Statutes of the State of Colorado, provides: "Every Constable to whom an exe- "cution shall be delivered, shall endorse on the back of "the same an exact memorandum of the day and hour "when the same shall have come to his hands, and shall "immediately proceed to levy the same, endorsing also "on the back of the execution the date of such levy, and "making an exact inventory of the property on which "the same shall have been levied; and shall appoint a "day and hour for the sale of such property, giving ten "days' previous notice of such sale by advertisement, in "writing, to be posted up at three public places in the "County; and on the day so appointed the said Consta-

"ble shall sell the property so levied on, or so much "thereof as may be necessary to pay the debt, interest "and costs, to the highest bidder."

The notice is set out in full and no objection appears in the records to its form, or its sufficiency or to the manner in which it was posted. The record shows it was posted in five public places. Under the law it need not have beeu posted in but three public places. The manner in which Constables make sale is by posting notices in three public places. This officer posted notices in five public places. The statute permitted the Treasurer to keep the property five days before advertising it, but in this instance he advertised it one day longer than was necessary and made the sale within the ten days prescribed by statute.

The proof tendered and rejected by the Court was strictly within the issues as made by the parties and tended directly to prove the material defense in the action. The fact is the Court ruled that one tenant in common was compelled to pay the taxes assessed against his co-tenant upon the common property, and could not suffer the delinquent tax payer's interest to be sold, which is not law.

When this case is reached, plaintiff in error desires to submit it upon this brief without oral argument.

For the errors above specified the judgment should be reversed.

Respectfully submitted,

L. C. ROCKWELL,

Attorney for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 222

HOWARD C. CHAPIN, PLAINTIFF IN ERROR,

vs.

JOSEPHINE F. STREETER, Executrix of James Streeter, Deceased, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ARGUMENT OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ARGUMENT OF DEFENDANT IN ERROR.

Streeter and Chapin, the original parties to the record, were partners in the hotel business, owning jointly the furniture and other personal property used in connection with that business, and being also joint owners of the hotel building, such co-partnership continuing through the years 1880 and 1881, and up to November 1st, 1881, when Streeter leased to Chapin the undivided one-half of the building and furniture therein. The personal property of the firm was

assessed for taxation in the firm name of Streeter & Chapin in the years 1880 and 1881. The record recites that on the first day of May, 1882, plaintiff and defendant were indebted to the County for taxes assessed against their joint personal property above mentioned, for the years 1880 and 1881, in the sum of $630; and that to satisfy the sum of $315. of such taxes, the treasurer distrained, advertised and sold the undivided one-half of such personal property; that previous to such distraint and sale Chapin had paid one-half of the taxes assessed against such joint property; that the sale was made on May 16th, 1882, to one Jacque for $106. Upon this sale the defense below was based. The plaintiff below having died pending the writ of error here, is executrix has been substituted as defendant in error.

"The property of a partnership shall be listed for taxation by a partner." Gen Laws Colo., 1877, sec. 2246.

"Every assessor shall assess all personal property in his county on the first day af May in each year. Any person required to list property in behalf of another shall do so in the same county in which he would be required to list it if it were his own; but he must list it separately from his own, naming the person or estate to whom it belongs." Gen. Laws Colo., sec. 2250.

"All taxes levied or assessed upon personal property of any kind whatsoever shall be and remain a perpetual lien *upon the property so levied upon, until the whole amount of such tax is paid;* and if such tax shall not be paid on or before the first day of January next succeeding such levy, it is hereby made the duty of the county treasurer to

collect the same by distress and sale of any of the *personal property so taxed*, or of any other property of the person assessed." *Ibid.* sec. 2337.

In this case the *person assessed* was the firm of Streeter & Chapin, and the property assessed for taxation, the joint property of the firm.

The statute confers no authority upon the treasurer to release any portion of the property assessed from the lien imposed upon it until the whole amount of taxes shall be paid; nor does it authorize him to determine the equities of partners or joint owners, and receive any less portion of the tax than the whole in discharge of one partner, and proceed against the moiety of the other partner in the common property for the remainder of the tax. The statute is summary and rigorous and must be strictly complied with. Cooley on Taxation, 441-443, 2d Edition.

The firm, and not the individual members, is to be considered the owner of its property for the purposes of the statute.

Stockwell vs. Brewer, 59 Maine, 286;
Frost vs. Parker, 54 N. J. Law, 71.

The payment made by Chapin could only have the effect of reducing the amount of the joint indebtedness, and consequently of the tax lien on the joint property. The property of the firm was still held in common, and whatever equity might have resulted in his favor as against Streeter, by reason of such payment, could only be considered and adjusted in proceedings to wind up the partnership and

divide what remained of the firm assets, after the payment of the firm debts.

In Eberstein vs. Oswald, 47 Mich., 254, it was held that the sale of an undivided interest in the estate of a deceased person by virtue of an order of the probate court, for the payment of debts, was void. In the opinion it is said:

"The only reason for selling less than the whole interest is that which is assigned by the executor in his petition for a license to sell, namely, that three of the heirs have since the death of the testator paid their share of the debts, while the other three have not. In our opinion the statute providing for the settlement of the estates of deceased persons and the sale of the real estate thereof by virtue of an order of the probate court for the payment of the debts of the deceased, does not authorize or justify a sale of an undivided interest or the interest of some of the heirs. The statute authorizes the sale of the whole, or of such parts of the real estate as may be necessary. These provisions do not authorize or contemplate the sale of an undivided interest in the estate, in case it is unnecessary to sell the whole. Whatever part or parcel of the estate is to be sold, it must be the entire interest which the deceased had therein—the interest of the estate as a whole—that must be sold. In like manner the statute providing for the sale of mortgaged premises in chancery authorizes a sale thereof. But under this provision the uniform practice, without a single exception, we believe, has been to sell the entire interest of the mortgagor in that portion of the premises sold. These statutes do not contemplate a

carving up of estates and sales of undivided interests less than the whole title therein; and the machinery of the probate court, ample though it is, is not adequate to the settlement of equities among heirs, and enforcing contribution between them in this way."

It is said, in Freeman on Void Judicial Sales, section 36, that sales of a different or a less interest than that of which the judgment debtor was seized, have, in several cases, been adjudged to be void. "The only substantial ground," says the author, "for their justification is that the officers charged with the seizure and sale of property were not intended to be given the power to carve a complete and perfect title into distinct estates or interests, thereby making the subject-matter of the sale less inviting to purchasers, and probably leading to a needless sacrifice."

See, Gordon vs. Lewis, 38 Maine, 210;
Brown vs. Clifford. 1 Sumner, 525.

Execution upon a judgment against partners or joint debtors may be executed either on their joint property, *or* on the separate property of one of them, *or* both on their joint and on their separate properties.

Ewell's Lindley on Partnership, p. 515.

It is believed that there is no authority and can be no justification for a levy on, and sale of, the interest of one of the partners or joint debtors in the joint property.

Where it is in the power of an officer, charged with the execution of process against chattels, to levy upon the entirety of such property, it would seem to be contrary to

the plainest principles of justice to permit the sale of an undivided interest. By such a method of procedure, several and successive levies might be made on the same chattels for the same debt, and the whole sacrificed by sales of undivided interests therein; for it needs no argument to demonstrate the fact that an undivided interest in a horse, or bed, or chair, could not be sold to the same relative advantage as the entire chattel.

Besides, a partner has no definite or specific interest in any part of the firm property. His interest has been defined as "his proportion of the partnership assets after they have been all realized and converted into money and all the debts and liabilities have been paid and discharged."

Ewell's Lindley on Partnership, p. 661.

And, while such interest has been considered, of necessity, liable for his private debts, there would seem to be little justification in law or common sense for its sale for the debts of the firm, when the officer might sell the property, or so much as might be necessary, *in specie*.

In this case the duty of the treasurer was plain. The property belonged to the firm of Streeter & Chapin and was so assessed. Under the statutes of Colorado, a partnership is considered as a distinct entity for the purposes of assessment and collection of taxes on firm property. No judgment is rendered against the firm or its members, but the treasurer is authorized to collect the tax summarily by seizure of any of the property assessed, or any other personal property of the person assessed. In this case the treasurer

did neither. In his notice of sale he declared that he had distrained the personal property of James Streeter, to-wit, the one-half of the joint property assessed. This appears to have been a plain deviation from the authority conferred. No severance of the interests of the members of the firm was ever made or attempted. The property was still held in common, and as such, impressed with the lien for taxes and liable to seizure for their payment. No authority is conferred to seize the separate property of a partner for the firm tax, nor was the property attempted to be sold in this case in any sense separate property.

"Any of the property assessed" can not be construed to mean an undivided portion of the whole, or the equitable interest of one member of the partnership to share in the surplus which might remain after the settlement of the firm affairs and payment of partnership debts, of which these very taxes were a part. The inevitable tendency of such a proceeding to cause oppression and the wanton and unnecssary sacrifice of property could not be better illustrated than by the case in hand, where the share of one member of a firm in property worth several thousand dollars is alleged to have been sold for a sum so ridiculously small as to shock the moral sensibilities of all, at the mere caprice of a tax collector, or, more probably, from a much worse motive; and this, by virtue of proceedings, *ex parte* in character, without personal notice or demand of payment, so far as the individual whose interest is claimed to have been forfeited is concerned, or opportunity for redmption. To sanction such a perversion of statutory authority would be to open the door

to fraud and improper practices, more numerous than the evils set free by the ill-omened Pandora.

The cases cited by counsel for plaintiff in error seem to have no possible bearing on the question presented. There seems to be no analogy between the sale of lands of tenants in common for taxes and the distraint of joint personal property for taxes assessed against a partnership, so far as the question presented is concerned. Moreover it is, to say the least, very doubtful whether a sale of an undivided interest in lands, based upon an assessment of the entire estate could be, under any circumstances, upheld, in the absence of express statute authority for such a proceeding.

See, Cooley on Taxation, p. 493, 2d Edition;
Roberts vs. Chan Tin Pen, 23 Cali., 259;
Cragin vs. Henry, 40 Iowa, 158.

This view is strengthened by the fact that the statutes of very many of the states provide, that where lands held by tenants in common are taxed by an entire assessment, one or more of such owners may pay the taxes for his or their undivided part or parts, particularly designating the part or parts for which payment is made, and the undivided remainder of such lands may be sold for the balance of taxes unpaid. Such a statute has existed in Michigan for many years. In *Butler vs. Porter*, no question was made as to the *power* to sell the undivided part in dispute. The only question was as to the right of the other co-tenant to purchase. If the decision in that case is to be considered as affirming the right to sell such undivided interest without express authority so to do, it seems strange that it

should have been overlooked by the learned author of the work on taxation above cited. In *Ronkendorff vs. Taylor's lessees*, the respective moieties were assessed separately.

But it seems fruitless to pursue this particular inquiry further. A tenant in common of realty is only liable individually for his proportion of the entire tax. A firm, and each partner jointly with all the others, is liable for the firm tax and every part of it. This is said to be true in general, where the tax is assessed against personal property belonging to several joint owners.

Meyers vs. Dubuque Co., 49 Iowa, 193.

For many purposes a firm is a distinct concern and possesses a sort of individuality. The assets are held in a sort of community, but the partners do not hold as common tenants or joint tenants. The property is distinctly separated from that belonging to the individual members and it constitutes an identical and entire interest. The law makes distinctions between debtors and creditors of the firm, and debtors and creditors of the persons composing the firm. It is just the same as though the firm were a natural person and acted personally. Taxes may be imposed on a firm in the firm name.

Hubbarston &c. Co. vs. Covert, 35 Mich., 260.

The dissolution of a firm by the act of the partners does not immediately terminate its existence for all purposes. It still subsists and continues for the purpose of closing up its concerns. Such dissolution does not exempt the firm property from taxation; it does not work a division or

separation of the property so that the share of each partner can be taxed to him, but it continues to be the property of the firm. The firm, for the purposes of taxation, continues to exist until its affairs are wound up, or until the firm property is disposed of.

Oliver vs. Lynn, 105 Mass., 143.

It seems only necessary to appeal to the elementary principles governing the partnership relation, the nature and obligation of firm debts, and the legal status of the firm property and the interests of individual partners therein, to vindicate the action of the Circuit Court in excluding the defense offered.

It appears from the evidence brought up in the bill of exceptions that the taxes were due and unpaid on May 1st, 1882, and that the sale was made on May 16th, 1882. It is not clearly stated that the distraint was made on the former date, although that might be inferred from its being mentioned in that connection. At all events it does not appear from the evidence that the distraint was made within ten days of the day of sale. The section of the statute cited on page 14 of plaintiff's argument requires that "the time of the sale shall not be more than ten days from the day of the taking."

The detention of the property for a longer time than the specified ten days renders the treasurer a trespasser *ab initio*, and sale made after that time is void.

Brackett vs. Vining, 49 Maine, 356;
Pierce vs. Benjamin, 14 Pickering, 356;
Noyes vs. Haverhill, 11 Cushing, 338.

This is only corollary to the proposition that the statutory authority must be strictly pursued. The sale within the ten days being a condition precedent to the authority of the treasurer to make it, it devolved upon the defendant below to show compliance with the statutory requirement.

Ronkendorff vs. Taylor's lessees, cited;

Borden vs. Reed, 6 Peters, 328.

Counsel for plaintiff in error having requested that the case be submitted upon written argument, the defendant in error unites in the request, and respectfully begs leave to submit the case on her behalf upon this brief.

Sam. R. Rose

COUNSEL FOR DEFENDANT IN ERROR.